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No. 01-0085

Supreme Court, U.S.
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In The

Supreme Court of the United States

SUE RIVERS, PERSONAL REPRESENTATIVE of the ESTATE of BOBBY LYNN HARRIS, DECEASED; DANNA TAYLOR, PERSONAL REPRESENTATIVE of the ESTATE of LETRICIA KAY HARRIS, DECEASED; SUE RIVERS and DANNA TAYLOR, as CO-PERSONAL REPRESENTATIVES of the ESTATE of CARRIE GAIL HARRIS; SUE RIVERS and DANNA TAYLOR, as CO-PERSONAL REPRESENTATIVES of the ESTATE of CANDY MICHELLE HARRIS; DELLA RUTH HARRIS; and EDGAR BLANKENSHIP,

Petitioners,

v.

WOOD COUNTY, BILL SKINNER and BILLY BLUNT,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Twelfth Judicial District Of Texas

PETITIONERS' REPLY

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REPLY

Nothing in Respondents' Brief in Opposition contradicts that which is essential to the Petition:

1) That the summary judgment evidence would support a jury finding that Deputy Blunt deliberately ordered a private citizen to drive while intoxicated, criminal activity that directly resulted in the deaths of all four members of the Harris family; and

2) That the court of appeals nevertheless ruled that Deputy Blunt's command did not violate the Fourteenth Amendment.

Though Respondents acknowledge at least this much, at page i and 5 of their Brief, they nevertheless attempt to "muddy up" the clearly presented issue in this case with the usual transparent tactics. First, Respondents attempt to muddy the otherwise clear factual waters of this case by ignoring its procedural posture and making what amount to jury arguments, putting their own biased "spin" on the summary judgment evidence, essentially treating Deputy Blunt's own self-serving testimony as conclusive. Second, Respondents dredge up a lame waiver argument that was rejected in the district court and never even raised in the court of appeals, which clearly reached and resolved the merits of the question presented in the Petition. Finally, Respondents attempt to muddy the clear legal waters in this case by spending the brunt of their brief arguing two legal points that were never reached by the court of appeals, including one that was not even a subject of Respondents' summary judgment motion in the district court. Lost in all of Respondents' mud slinging is their failure to marshal even one argument that counsels against this Court granting review of the constitutional point presented in the Petition, a point that the court of appeals clearly resolved in a way that directly conflicts with this Court's precedent.

I. In Utter Denial Of The Procedural Posture Of This Case, Respondents Continually Ignore The Genuine Issues Of Material Fact Raised By The Summary Judgment Evidence, And Present Only Their Own Version Of What Happened.

Essentially, Respondents' view of the evidence relies on Deputy Blunt's own self-serving testimony and ignores virtually everything else. It is true that Blunt is the only living witness to his conversation with the drunk. The drunk is dead, along with the four innocent citizens he took with him. The drunk's ex-girlfriend, and everyone else at her place, were also drunk, and indoors at the time of the critical conversation (C.R. 156-158, 173, 195-196). Nevertheless, Blunt's awareness of the drunk's degree of intoxication at the time Blunt ordered him to drive away can be established through circumstantial evidence. And there is abundant circumstantial evidence in the summary judgment record that contradicts Blunt's testimony. *See* Petition, 2-5. As the court of appeals recognized, the "summary judgment evidence shows that Blunt, when he told Knight to leave the premises, essentially instructed Knight to drive his vehicle while intoxicated." Petition, App. 2.

Respondents will be free at trial – if there is one – to argue that Deputy Blunt observed no signs of intoxication in an individual who was noticeably drunk before driving to his ex-girlfriend's residence, who had four more beers while standing outside her residence creating a domestic disturbance, whose blood-alcohol content was .17 just minutes after Blunt ordered him to leave, and who, upon being instructed to leave, protested to Blunt that he'd been drinking. Respondents will also be free to present the rest of their jury arguments at trial – *e.g.*, that it is a "distortion" for Petitioners to argue that Blunt ordered Knight to drive drunk, when he really only "instructed" or "told" the drunk to "leave the scene." After all, the Respondents argue at page 4, Deputy Blunt can hardly be held responsible when the drunk, leaning

against his pickup on private rural property, and informed that he would be arrested for trespassing if he did not leave, chose to drive rather than walk away. Besides, Respondents continue at page 11, Blunt did not know that anybody else, much less the Harrises, would be using the roads at that time.

Given the procedural posture of this case – decided on summary judgment – this Court is certainly not the forum for Respondents to employ their creative "spin" on the evidence. Instead, as the court of appeals recognized (Petition, App. 3), it is the summary judgment evidence that supports *Petitioners' version* of the events, and the reasonable inferences to be drawn therefrom, that constitutes the applicable "Statement of Facts" for purposes of ruling on the Petition. And Petitioners would gladly welcome an inquiry by this Court into the summary judgment record if it has any doubts as to which party's version is a "distortion."

II. A Constitutional Point That Is Raised At Every Level Of The Proceedings, And That Was Resolved On The Merits By The Court Whose Opinion Is The Subject of The Petition, Is Not Waived.

The Petitioners have been arguing *Blum v. Yaretsky*'s state-coercion theory of state action since the very beginning of this litigation. Petitioners' state court pleading could not have been clearer. Blunt violated § 1983 "by instructing" and "by ordering" the drunk to drive the vehicle. (¶¶ 83, 84). Indeed, Blum's coercion theory was central to the argument that convinced the district court ultimately to rule in Petitioners' favor on summary judgment. *Blum's* coercion theory was a centerpiece of the briefs submitted to the court of appeals, and that court decided *Blum's* applicability on the merits. *See* Petition, App. 7-12. *Blum* was also one of a number of state coercion cases brought to the Texas Supreme Court's attention in the Petition for Review (at pp. 3-6, 9-12) filed in that court; indeed, the Petition for Review filed in the Texas

Supreme Court raised the very same points raised in the Petition for Writ of Certiorari. It is well-settled that this Court will not find a constitutional point waived when the state court has reached the issue on the merits and the issue is clearly presented in a Petition for Writ of Certiorari. *Orr v. Orr*, 440 U.S. 268, 274-75 (1979); *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 134 (1914); *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 299 n.3 (1971). Thus, it is inconceivable that the question presented by Petitioners has somehow been waived.

Respondents' waiver argument is particularly disingenuous given that they did not even raise the waiver point in either the court of appeals or in the Texas Supreme Court. The only court in which Respondents contended that the state coercion theory of governmental accountability had been waived was in the district court, which rejected the Respondents' contention without discussion in denying Respondents' motion for summary judgment. Respondents' "waiver" argument in the district court was part of their ongoing refusal to acknowledge that this is a governmental coercion case governed by long settled Supreme Court precedent. Respondents obstinately insist that this is a "state-created danger" case (Respondents' buzzwords for a case alleging a mere passive failure to intervene in private activity), a legal theory whose contours, according to Respondents, can be debated in the aftermath of *DeShaney*. Apparently, Respondents believe that they will have a stronger argument for qualified immunity if the constitutional principles involved are new ones that have been generated by this Court's decision in *DeShaney*, rather than if the principles involved are old ones in no way unsettled by *DeShaney*.

The court of appeals obviously saw the issue in this case as one generated by (and hence governed by) *DeShaney*. The Petition for Writ of Certiorari espouses the contrary view – that this case is governed by a theory of state action that predates *DeShaney*, was not at issue in *DeShaney*, and clearly survives *DeShaney*. However this

matter is resolved, it is beyond dispute that Petitioners did not "waive" the constitutional point that is at the heart of their Petition for Writ of Certiorari. Moreover, Respondents abandoned their "waiver" argument on appeal, probably due to the chilly reception it received in the district court. Finally, the court of appeals reached and resolved (albeit adversely to Petitioner) the Petitioners' contention that this case is controlled by *Blum v. Yaretsky* and other decisions of this Court holding governmental officials constitutionally accountable for private party action that the officials themselves have used their governmental authority to incite.

III. Instead Of Confronting The Legal Issue Actually Decided By The Court Of Appeals, Which Is, Consequently, The Subject Of The Petition, Respondents Attempt To Avoid The Issue By Arguing Legal Points Neither Expressly Nor Even Implicitly Decided Below.

As urged throughout the Petition, the court of appeals' decision in this case is fundamentally contrary to the precedents of this Court that hold a governmental official constitutionally accountable for private party actions taken in compliant response to an order or command issued by the official. For all practical purposes, the court of appeals interpreted *DeShaney* (wrongly) to overrule this Court's state coercion precedent. If this Court had issued the same opinion as the court of appeals, the only possible interpretation would be that the Court had overruled *Blum v. Yaretsky* and all the rest of its decisions holding that private activity commanded by state officials is state activity for which the commanding officials are constitutionally accountable.

Respondents nowhere squarely confront the conflict with this Court's precedent generated by the state courts' ultimate resolution of this issue. Instead, the Respondents spend nearly 10 pages of their brief, pages 7-17, arguing legal points that were no part of the court of appeals'

decision, including one that was not even raised in their summary judgment motion.

First, on pages 7-13, the Respondents argue that ordering a private citizen to drive while intoxicated is not "conscience-shocking," contending that "deliberate indifference" does not always constitute a "conscience-shocking" exercise of power, and attempting to compare the routine domestic disturbance confronted by Deputy Blunt with the high speed chase involved in *Sacramento v. Lewis*. Respondents' argument suffers from several fatal flaws. First, Respondents' summary judgment motion never even raised this point. Indeed, in the district court, Respondents fully acknowledged that "deliberate indifference" was the controlling standard. Motion for Summary Judgment, at 13-14. The first time that Respondents argued that the "conscience-shocking" standard might require more than "deliberate indifference" in this case was in their rebuttal at oral argument in the court of appeals. Second, and more fundamentally, the court of appeals' decision neither resolves nor even acknowledges this "issue." If there is ever a trial in this case, Respondents can submit proposed jury instructions and press this point then.[1] Additionally, the Respondents will be free to argue, again at trial, that the drunk appeared to Blunt to be just a little bit drunk, or that the drunk was good at hiding his drunkenness, and that, as a consequence thereof, Blunt's exercise of authority was less than "conscience-shocking." Ultimately, however, since the degree of outrageousness of Deputy Blunt's exercise of authority depends on the degree of obviousness of the private citizen's intoxication, and perhaps the degree of

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[1] Though it's not much of a point. To apply *Sacramento v. Lewis'* heightened "intent to harm" standard to routine situations regularly confronted by officers would not only cut the *Lewis* standard free from its emergency rationale, it would make the "deliberate indifference" standard the exception rather than the general rule for demonstrating "conscience-shocking" behavior.

his intoxication, the issue of whether Blunt's use of authority is or is not "conscience-shocking" is a classic jury question.

Second, on pages 13-17 of their brief, Respondents make a qualified immunity argument. The court of appeals decided only that Petitioners' claims against Deputy Blunt failed to allege the deprivation of a constitutional right. *See* Petition, App. 13. Consequently, the court of appeals declined to reach the qualified immunity issue. *See id.* Furthermore, had the court of appeals correctly applied this Court's state coercion precedent, it is far from clear how Deputy Blunt could get off the hook on qualified immunity grounds. The state coercion theory of constitutional accountability, as well as every other legal doctrine that plaintiffs rely on to establish Blunt's § 1983 liability, were clearly established at the time Deputy Blunt issued his ill-fated command. To put it succinctly, a reasonable officer in Deputy Blunt's position surely would have understood that ordering a drunk to commit a life-threatening crime is contrary to settled law. *See Anderson v. Creighton*, 483 U.S. 635, 640-41 (1987). In any event, the court of appeals did not address this issue, and there is no need for this Court to address it, although Petitioners would gladly brief the qualified immunity issue should the Court ultimately desire to reach that issue as a consequence of its granting review.

IV. Reviewing This Case And Deciding It Correctly Would Place No Cost On Any Governmental Entity Or Official Except Those Officials Who Deliberately Abuse Their Authority By Ordering Private Citizens To Engage In Life-Threatening Criminal Conduct That Directly Results In Death.

At least since this Court decided *Blum v. Yaretsky* in 1982, an official clothed with authority under state law has been required, under threat of individual liability pursuant to 42 U.S.C. § 1983, to avoid exercising that authority to coerce private citizens to engage in conduct

that threatens fundamental constitutional freedoms. 457 U.S. 991, 1004. Consequently, this Court should have no concern about "opening the floodgates" to challenges to police authority. Whatever "floodgate" exists has already been opened by this Court. And experience has shown that there is no "flood" of litigation alleging that governmental officials have coerced private parties into conduct that undermines constitutional values. Hopefully, that is because an abuse of authority such as occurred in the present case is so egregious that it happens only infrequently.[2] Truly, this is a case that this Court can decide without imposing any cost on honest, competent public officials.

Deciding this case correctly would impose a cost only on those public officials who, like Deputy Blunt, deliberately abuse their authority by ordering private citizens to engage in life-threatening criminal conduct. Deciding this case correctly would leave numerous options for police to deal with drunk drivers (or drunken "soon to be" drivers) without incurring even the slightest risk of liability. Indeed, a police officer would remain free to do nothing. If an officer sees a drunk driver and decides not to pull him over, that is an *o*mission rather than a *co*mission and therefore not an appropriate basis for liability under the Due Process Clause. *See DeShaney v. Winnebago Dept. of Social Services*, 489 U.S. 189, 195-201 (1989); *see also* Petition, at 18-22 (explaining the fundamental constitutional difference between governmental omissions and affirmative exercises of governmental authority). If an officer sees a drunk about to get in a car, *DeShaney* absolutely protects the officer who chooses to do nothing. *See id.* If an officer stops a car and determines that the

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[2] Or, perhaps drunks are ordered onto the highway more often than we want to believe, but litigation does not arise when those drunks make it home without killing anyone. Or, perhaps it's difficult to prove such an order when the only two witnesses are the officer and the drunk, who, as in this case, is often killed as a result of the accident.

driver is drunk but permits the drunk to continue driving, again *DeShaney* forecloses liability. *See id.* If an officer stops a driver and fails to determine that the driver is drunk and allows the driver to continue on his way, again *DeShaney* absolutely protects the officer. *See id.* Under *DeShaney*, an officer can try to alleviate the danger; or, an officer can choose to ignore the danger; or, an officer can fail to appreciate the danger; or, an officer can intervene but then, for any reason or no reason, choose to leave the situation as he found it, leaving the problem utterly unsolved – *all without any possible threat of liability. See id.* The only thing the officer cannot do, and confidently avoid liability, is what Deputy Blunt did in the present case – affirmatively exercise his authority to put a drunk on the highway who would not otherwise be on the highway. In such a case, the officer's exercise of authority is the very *source* of the threat that the private party poses to the public. Consequently, the dangerous behavior of the private actor becomes state-ordered behavior (or, state action) for which the commanding official is constitutionally responsible. *See Blum*, 457 U.S. at 1004; *see also* Petition, at 7-8, 14-17.

Additionally, though there may be numerous situations in which officers issue orders to private citizens, officers have little occasion to order citizens to commit life-threatening crimes. Short of such an obviously and flagrantly inappropriate order, it will not be possible to establish that the officer engaged in "conscience-shocking" behavior that directly resulted in death, which is essential to making out a violation of the Due Process Clause. *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). "Conscience-shocking" police behavior consists of "deliberate indifference" to an obvious threat to life, a mental state that the United States Supreme Court has equated with *criminal* recklessness. *Id.* at 849-50; *Farmer v. Brennan*, 511 U.S. 825, 835-37 (1994). Inherently, then, the threat of liability posed to police officers by a correct

decision in the present case will impact only those officers who commit the most egregious abuses of authority, and who are therefore appropriately *deserving* of liability.

CONCLUSION

Because recovery against officials like Deputy Blunt is often foreclosed under state law, and because recovery against the governmental subdivisions that employ them is rarely achievable under § 1983, it is important to keep at least one avenue of recovery open to citizens injured or killed by exercises of state law authority such as the one involved in the present case. But that avenue, too, will be closed if this Court permits the *DeShaney* principle to swallow *Blum's* state coercion theory of official accountability. This is an important case, a case that as it currently stands sets a precedent that undermines one of this Court's fundamentals of constitutional adjudication.

Respectfully submitted,

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